

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION**

**In re: BRIDGESTONE/FIRESTONE, INC.,) Master File No. IP 00-9373-C-B/S
TIRES PRODUCTS LIABILITY LITIGATION) MDL NO. 1373
_____)
THIS DOCUMENT RELATES TO ALL)
ACTIONS)**

ENTRY REGARDING “SUPPLEMENTAL” AND REBUTTAL EXPERT WITNESSES

This Entry is intended to resolve the numerous questions that have been raised by the parties regarding the provision for “supplemental” expert witnesses contained in the various case management orders in this MDL. While the issue has been raised specifically by motion in at least three cases,¹ it is of potential interest to all parties in all cases in the MDL, and therefore the magistrate judge has decided to address it in this generally applicable Entry, rather than on a case-by-case basis. This Entry also will address the related issue of the propriety and timing of rebuttal expert reports, an issue which has been raised on several occasions during the regular status conferences with the magistrate judge.

The supplemental expert witness provision was contained in the parties’ submissions which formed the basis of the October 26, 2001, Order Amending Certain Case Management Deadlines. A supplemental expert witness is defined in that Order as an expert “who will offer expert opinions on a topic for which another party has identified an expert, but for which the supplementing party has not yet identified an expert.” In its recent filings in the three cases listed in footnote 1 above, Firestone explains that “[t]he supplemental expert disclosure provisions were expressly entered at defendants’ request to avoid the potential unfairness that might otherwise arise from the initial simultaneous disclosure of experts by all parties.” It was unclear

¹*Carrillo v. Bridgestone/Firestone, Inc.*, IP 00-5005-C-B/S; *Ramirez v. Bridgestone/Firestone, Inc.*, IP 00-5006-C-B/S; *Alvarez v. Bridgestone/Firestone, Inc.*, IP 01-5286-C-B/S.

to the magistrate judge at the time, and is still somewhat unclear today, how a supplemental expert differs in practical terms from a traditional rebuttal expert, although theoretically it is possible that a supplemental expert witness's testimony may be broader than that of a rebuttal expert witness, in that a supplemental expert witness may opine about a topic or subject matter raised by the other side's expert, without being strictly confined to rebutting the testimony or report of that other expert.

Pursuant to the October 26, 2001, Order and others subsequent to it, the time line for expert witness disclosures, as agreed to by the parties, is approximately as follows:

- Day 1: The parties simultaneously exchange lists identifying the names of their expert witnesses and the topics about which they will testify.
- Day 31: The plaintiffs serve their expert witness reports for the witnesses they identified in Step 1.
- Day 31: The parties simultaneously exchange lists of supplemental experts.
- Day 61: The defendants serve their expert witness reports for the witnesses they identified in Step 1.
- Day 61: All parties serve their supplemental expert witness reports.

In theory, this time line seems reasonable. However, in practice it has proven somewhat impractical, as demonstrated both by the motions filed in the cases listed in footnote 1 above and by various discussions of the issue during recent status conferences between the parties and the magistrate judge. The problem stems from the fact that a party must determine whether it needs any supplemental experts by interpreting the often rather generic or broad topics listed by the other side in its initial list of experts and topics. In other words, rather than reviewing the other side's expert reports and making an informed judgment whether rebuttal expert testimony is

needed, a party must attempt to anticipate what each of the other side's experts will testify about based upon the topic given. Not surprisingly, the tendency for the careful attorney in that situation is to interpret each topic broadly and name supplemental experts in an abundance of caution, leading to disputes regarding the propriety of the supplemental experts—all before the original expert reports have been submitted. These disputes are difficult, if not impossible, to resolve in a vacuum—the topics listed with the initial disclosures are just as vague and uninformative to the court as they are to the parties.

That said, the supplemental expert provision was agreed upon by the parties, and the magistrate judge is loathe to eliminate it altogether at this stage of the litigation, even if it seems to be causing more problems than it solves. However, the magistrate judge strongly urges the parties to consider whether the supplemental expert they are disclosing is, in fact, a rebuttal expert. If it is, then Federal Rule of Civil Procedure 26(a)(2)(C) provides the applicable disclosure deadline, inasmuch as none of the case management orders in this case have a provision for rebuttal expert witnesses. Pursuant to Rule 26(a)(2)(C), rebuttal expert reports are to be served within 30 days of the date the other party's corresponding report was served. There is no deadline for the disclosure of the identify rebuttal experts separate from the deadline for rebuttal expert reports.

If a party sees the need to name a supplemental expert—that is, an expert who will testify with regard to a topic or subject matter identified by the other side but will not “solely . . . contradict or rebut evidence on the same subject matter identified by another party,” see Rule 26(a)(2)(C)—rather than a rebuttal expert, then it may do so as provided for in the applicable orders in this proceeding. However, disputes regarding specific supplemental experts should not be raised with the court until after the supplemental expert has served his or her report, at which

time the opposing parties shall have **21 days** to file a motion to strike the expert report on the ground that it is not an appropriate supplemental expert. That will enable the parties to make an informed decision regarding whether such a motion to strike is appropriate, and, more importantly, will enable the court to resolve the dispute in an informed manner.

The motions to strike filed in the cases listed in footnote 1 above are therefore **denied** at this time; if necessary, Firestone may file motions to strike in those cases pursuant to this Entry after the supplemental expert reports in question have been submitted.

ENTERED this _____ day of April 2002.

V. Sue Shields
United States Magistrate Judge
Southern District of Indiana

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